

Department of Agriculture  
Commodity Credit Corporation

Procurement of Commodities  
For Foreign Donation  
72 CFR Part 1496  
RIN 0650-AH39

Further Comments of  
American President Lines, Ltd.,  
CP Ships USA, LLC  
and Maersk Line

By *Federal Register* notice of April 7, 2006, (71 *Fed. Reg.* 17767) (“Notice”), the Commodity Credit Corporation (“CCC”) announced two clarifying changes to the proposed rule in this docket first announced in the *Federal Register* of December 16, 2005 (70 *Fed. Reg.* 74717). In addition, CCC invited “respondents” to “provide information and data on the economic effects of the proposed adoption of a one-step procurement system on their business operations. \* \* \* These comments should include data appropriate for economic analysis.” [at 71 *Fed. Reg.* 17767]

American President Lines, Ltd., CP Ships USA, LLC and Maersk Line (collectively referenced herein as “APL/CPS/ML”) previously have filed comments in this docket (under date of March 9, 2006). We appreciate CCC’s recognition in its current notice of the relevance, and importance, to the rulemaking of an evaluation of the economic impact of the proposed rule on the potentially affected stakeholders – identified by CCC in the April 7, 2006 Notice as “ocean carriers, commodity suppliers, ports, railroads and private relief agencies.” With all respect, however, CCC’s invitation for comments in its April 7, 2006 Notice strongly suggests that CCC has failed to pay serious attention to the comments that have already been filed in this docket. That is because the central theme of those comments is that information about the

implementation of the proposed rule is so lacking that potentially affected stakeholders are unable to make informed or meaningful substantive comment addressed to the proposed rule.

That position lies at the heart of the March 9, 2006 comments filed by APL/CPS/ML. We explained there that CCC's notice of the proposed rule failed to identify the operational detail of the revised procurement procedures, a circumstance that, alone, has caused the relevant stakeholders to lack the requisite understanding of the proposed rule to be in a position to evaluate the impact of the changes there contemplated. We also documented a representative sampling of the numerous, outstanding uncertainties and inter-agency disputes over the standards for award of ocean-transportation contracts for carriage of humanitarian food aid cargo – a context that furthers the confusion over the implications of the new procurement regime being proposed.

The position so stated by APL/CPS/ML in their March 9, 2006 comments is consistent with the position stated by the other commentators responding to CCC's proposed rulemaking. Indeed, with the exception of several *pro forma* filings, *e.g.*, by the North American Millers' Association and Catholic Relief Services, every commentator – spanning the spectrum of affected interests identified in the April 7, 2006 Notice – complained of the absence of a meaningful explanation of how the proposed procedures would be implemented:

(a) Ports. The Virginia Port Authority, for example, stated in its comments (dated March 7, 2006) that:

“We do not feel that this proposed rule change has been analyzed and/or explained in enough detail to allow the stakeholders in this business to assess the likely impact on their business level.” (p. 1)

It recommended further analysis and testing of the proposed rule change, noting that:

“Only after such an analysis is completed, and the findings shared, can any port realistically measure the impact of the rule change.”

Another major port, the Illinois International Port District (Chicago), stated a similar position in comments of March 3, 2006 that “wholeheartedly” endorsed the position previously taken by Transfer Logistics, Inc. at a public meeting conducted by CCC on February 21, 2006, where Transfer Logistics identified that it was “very concerned about the proposed rule changes” and objected to the “changes in procedure without a full and open disclosure of the process.” (Transcript of February 21, 2006 meeting, at p. 30)

(b) Carriers. Carrier comments in the proposed rulemaking were filed (in addition to APL/CPS/ML) by or on behalf of Sealift, Inc., Liberty Maritime Corporation, Maybank Shipping Company, Inc., Teco Ocean Shipping, and Central Gulf Lines, Inc./Waterman Steamship Corporation.

Sealift stated the position (comments of March 9, 2006):

“[T]hat the information available to the industry on this proposal is so limited that we lack the requisite information to formulate comments.” (p. 1)

It went on in its comments to particularize this position, making many of the points identified in the APL/CPS/ML filing.

Liberty complained that:

“[i]t is unclear as to how [the cargo preference] requirements would be applied, and the proposed rule does not provide any guidance and parameters. Liberty recommends that CCC explain how the cargo preference requirements will be applied and complied with before CCC proceeds to a final rule.” (Comments of March 9, 2006, p. 3)

Liberty also identified that “[d]espite its importance” to the proposed rule, the Freight Bid Entry System (“FBES”) “has, to date, been developed without significant industry input,” and stated that “FBES is too important and significant a system to be developed, tested, adopted and implemented without the input of affected persons” – meaning formal notice and comment

procedures. In its December 17, 2005 Notice, CCC identified FBES as integral to the proposed rule (at 70 *Fed. Reg.* 74718).

Central Gulf/Waterman commented that they:

“are most concerned that the adoption and implementation of the proposed new procedures by the CCC may ignore applicable cargo preference laws and policies \* \* \* the agency avoids any real discussion in the NPRM about the vital need to ensure that the adoption and implementation of new CCC procedures will comply [with those requirements].” (Comments of March 9, 2006, pp. 1-2)

Maybank, which filed comments on January 11, 2006 and supplemented those comments on March 8, 2006, stressed that, despite the fact that the proposed rule “has the potential to effect [*sic*] in a material way \* \* \* U.S.-flag carriers,” there is a total absence of transparency as to the interaction of the proposed rule and cargo preference mandates:

“policy issues arising out of legal mandates cannot be dismissed until they are identified and reviewed; this has not been accomplished.” (Comments January 11, 2006, p. 1; March 8, p. 1)

See also Teco’s concern, *inter alia*, about the “rush to implement the new computer one-step bid evaluation process \* \* \*.” (Comments, March 9, 2006)

(c) Other Stakeholders. In addition to the ports and carriers potentially affected by the proposed rule, other participants in the humanitarian food aid process filed comments identifying their uncertainty (and concerns) as to how the rule would impact upon them. We have already (p. 3) referenced the comments of Transfer Logistics, a major transloader at the ports of Chicago and Portsmouth, Virginia, which were essentially echoed in comments filed on March 2, 2006 by the Chicago SouthShore & South Bend Railroad. In addition, in comments filed on March 9, 2006, Muller Shipping Corporation – a forwarding agent – identified a number of respects relevant to cooperating sponsors in which the operation and effect of the proposed rule was uncertain.

We would have thought that the message undertaken to be conveyed in these prior filings could not be plainer: among other concerns addressed to the proposed rule is the concern that CCC has failed to provide potentially affected stakeholders sufficient information to understand how the rule will be implemented and how it will impact them. Nothing has occurred since the March 9, 2006 comment date, and there is nothing in the CCC notice of April 7, 2006, that remedies that critical omission. Interested parties are now no more in a position to provide meaningful "information and data on the economic effects of the proposed adoption of a one-step procurement system on their business operation" than they were when they filed comments two months ago expressing frustration about the total absence of clarity about the operational details of CCC's proposed rule.

It is obvious from the December 17, 2005 Notice that CCC anticipates significant impact on the relevant stakeholders if the proposed rule is implemented, including changes in the distribution of humanitarian food aid cargoes among carriers and ports. APL, CPS and ML are important contributors to the humanitarian food aid program: they currently carry almost 50% of the humanitarian food aid packaged cargo moving on liner vessels, reflecting the efficient and cost-effective service they provide. (See March 9, 2006 Comments, p. 2) Accordingly, we are anxious to comply with CCC's request, for the obvious reason that changes that redistribute cargo among carriers and ports have the potential to affect APL's, CPS' and/or ML's participation in the important humanitarian food aid programs. For the reasons identified above, however, CCC has failed to provide us, and the other participants in the programs, the means to do so. We urge CCC to remedy this condition.

Robert T. Basseches  
Richard L. Matheny, III  
Goodwin Procter, LLP  
901 New York Avenue, NW  
Washington, DC 20001  
Of Counsel to American President  
Lines, Ltd.

Respectfully submitted,

*Charles E. Boggs*

Charles E. Boggs  
Vice President, Humanitarian Aid  
American President Lines, Ltd.

*Charles B. Weymouth*

Charles B. Weymouth  
Director Government Affairs  
CP Ships USA, LLC

*James G. Dorrian*

James G. Dorrian  
Director Government Marketing  
Maersk Line

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